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IN THE SUPREME COURT OF THE UNITED STATES

No. 77-347

OCTOBER TERM, 1977

CHARLES WALLACE NOLAN, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Charles Wallace Nolan, Jr., by his undersigned attorney, petitions this Honorable Court for issuance of a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review the decision of that Court affirming petitioner's conviction and sentence for Unlawful Importation of Marijuana, rendered in the United States District

Court for the District of Kansas, sitting at Wichita, the Honorable Wesley Brown, Chief Judge, presiding.

In support hereof, your petitioner represents as follows:

OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals sought to be reviewed is reported at 551 F.2d 266.

JURISDICTIONAL GROUNDS

(i) The judgment affirming the conviction was rendered March 22, 1977.

(ii) Petition for Re-hearing and suggestion for Re-hearing *En Banc* were denied July 7, 1977.

(iii) The statutory basis for jurisdiction is found at 28 U.S.C. §1254.

QUESTIONS FOR REVIEW

(i) Admissibility of prior unlawful acts during government's case-in-chief, under Federal Rules of evidence 404(b) and 403.

(ii) Propriety of receiving evidence and allowing argument during trial for Unlawful Importation of Marijuana, as to "street value" and anticipated profits upon ultimate

sale, where defendant's intent to distribute is neither charged nor proven.

RULES INVOLVED

(i) Rule 404(b):

> "Other crimes, wrongs, or acts. — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident."

(ii) Rule 403:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of accumulative evidence."

Both rules appear in Title 28, Appendix, United States Code, Federal Rules of Evidence.

STATEMENT OF FACTS

On July 3, 1975, Paul Edward Donagen shipped three (3) musical instruments from New Delhi, India, to the defendant in Emporia, Kansas. When the crate arrived at Wichita International Airport, a U. S. Custom's Agent ran a

computer check on the defendant/consignee's name, which revealed a 1973 conviction in Great Britain for an unspecified drug violation. This information prompted the custom's agent to make a careful inspection of the shipping crate, which resulted in the discovery of approximately eight (8) pounds of marijuana concealed in hollowed out portions of the wooden shipping crate. When the defendant arrived to pick up his package, he was arrested by the federal agents for Unlawful Importation of Marijuana in violation of 21 U.S.C. §952(a).

At trial, no evidence was offered that Nolan either shipped the crate himself, or caused the Paul Edward Donagen to ship it, or that there was any connection between them. At trial, the government offered the following evidence:

> 1. Testimony of the custom's agent that he ran the computer check, and that it revealed the English violation, to show justification for searching the packing crate.
>
> 2. Testimony of a British Customer's Agent that he had arrested Nolan in 1973 for attempting to import hashish into England, concealed in hollowed out wooden lamps, which Nolan had brought on a flight from New Delhi, India. The British Custom's Agent also stated that one quarter (¼) of *all* contraband which he discovers is found concealed in hollowed out wooden objects. The

Custom's Agent was also permitted to testify, over Nolan's objection, concerning admissions made by Nolan in 1973 regarding the English violation, the filing of charges and the conviction (without supporting documentation), the content of the presentence investigation, and the remarks of the Trial Judge at the time of sentencing.

> 3. Testimony from an agent of the Drug Enforcement Administration as to the "street value" of the eight pounds of marijuana which Nolan was accused of importing.

Then, the government's attorney, in his summation, stated that:

> "The defendant knew exactly what he was doing and he hoped to profit by it, to-wit, under the testimony of Special Agent Jim Miller, who testified as to the value, the 'street value' of the marijuana, approximately $20.00 an ounce. There were approximately one hundred twenty ounces, $2,400.00 which is not too bad for a day's work.
>
> * * *
>
> The defendant got caught with his hand in the cookie jar and now he has to take his medicine. It's that simple."

On the basis of the foregoing remarks, the defendant moved for a mistrial, and his Motion was denied. The defendant was convicted, and sentenced to three (3) years

imprisonment, followed by a two (2) year probationary term.

BASIS FOR FEDERAL JURISDICTION

District Courts of the United States have original jurisdiction to adjudicate all offenses against the United States under Acts of Congress, pursuant to 18 U.S.C. §3231.

ARGUMENT FOR ALLOWANCE OF WRIT

This case is well suited to the considerations governing review on certiorari set forth under Rule 19 of the Rules of the United States Supreme Court, in the following particulars:

1. The decision of the Court of Appeals is in conflict with other decisions of Courts of Appeals in other Circuits.

2. The decision of the Tenth Circuit construes Rule 404(b) and 403 of the new Federal Rules of Evidence, neither of which have previously been construed by the U. S. Supreme Court.

3. The decision of the Court of Appeals constitutes a marked departure from the accepted and usual course of judicial proceedings, which have heretofore exhibited strong disfavor of using prior unlawful conduct to establish present guilt and this decision is in conflict with previous decisions of the U.S. Supreme Court on the same subject matter,

but which were rendered prior to the adoption of the Federal Rules of Evidence.

4. There exists an urgent need for the U. S. Supreme Court to establish clear and unambiguous criteria for the application of Rule 404(b) and; where evidence is deemed admissible thereunder, a subsequent reconsideration of the prejudicial impact of such evidence under Rule 403 should be mandated.

5. Confusion exists among the various Circuits, and guidelines must be established, as to what degree of *similarity* need be shown between the prior bad act and the offending act to render the evidence admissible under Rule 404(b).

Historically, attempts by prosecutors to inform a jury that an accused was guilty of prior unlawful acts, have met with intense judicial disfavor. An underlying concept of the Anglo-American system of criminal law is that an accused must be protected against forcible inculpation; either by his words or proof of his past misdeeds. The introduction of such evidence creates the obvious danger that the jury will punish the defendant for the offense because it believes him to be a person of bad character or because of the notion that since he committed some other similar crime, he must also have committed the crime for which he is now on trial. See *U.S. v. Goodwin*, 492 F.2d 1141, (5th Cir. 1974).

The majority decision of the Tenth Circuit Court of Appeals in *U.S. v. Burkhart*, 458 F.2d 201, (10th Cir. 1972),

recognized that, once a jury learns of a defendant's sordid past, the trial is for all practical purposes over, and the guilty verdict follows as a mere formality. (In *Burkhart, supra,* a strong dissent was offered by Circuit Judge Barrett. Judge Barrett, coincidentally, wrote the opinion below in the case at bar; which converts Judge Barrett's dissent in *Burkhart* to the law of the circuit.)

On July 1, 1975, fifteen days before Nolan was arrested, and but a few months before his trial began, the Federal Rules of Evidence (Public Law 93-595) became effective. Rule 404 excludes evidence of prior wrongs to impugn the character of the accused, but Rule 404(b) permits such evidence to show ". . . motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b) was merely a codification of long-standing common law governing the admissibility of such character evidence. Rule 403 embodies the common law "balancing test" under which the Trial Judge must weigh the potential for prejudice arising from the admission of such character evidence against its probative value in the trial.

When the government offered evidence of petitioner Nolan's prior unlawful conduct, the Trial Judge invoked Rule 404(b) to sanction its admissibility, with the mere comment that,

> ". . . it can be shown purely for the purpose of intent, design, a continuing course of conduct,

> guilty knowledge, mental disposition, a course of conduct, capacity, habit, plan, motive or identity."

It is the very manner in which Rule 404(b) was applied below which demonstrates the desirability and necessity of granting certiorari to review the merits of the Trial Judge's decision. Rule 404(b) was invoked without any supporting reasoning (and without any evidence that Rule 403 was considered) by the Trial Judge in the fashion of a magic incantation, the mere recital of which supposedly removed all barriers to the admissibility of the prejudicial evidence of prior unlawful acts, contrary to hundreds of years of Anglo-American policy strongly disfavoring proof of guilt by character assassination. As noted in *U. S. v. Taglione,* 546 F.2d 194 (5th Cir. 1977)

> "The various categories of exceptions [to Rule 404] are not magic passwords whose mere incantation will open wide the Courtroom doors to whatever evidence may be offered in their names."

Rule 404 is supposed to be a rule of *exclusion*. Exceptions to the rule of *exclusion* are found in Rule 404(b). In the case at bar, neither the government's attorney, the Trial Judge, nor the Tenth Circuit *ever* specified just which exception to the *exclusionary* provision of Rule 404 is, or was, established by the evidence of Nolan's prior unlawful conduct; or just *how* it establishes this fact. It is respectfully submitted that Rule 404 was *never* intended to be applied in

this fashion. In order for evidence of a prior bad act to be admissible, the government's attorney must be prepared to explain *precisely* how this evidence may tend to prove or disprove a proper consequential fact in the case. (See 2 Weinstein's Evidence, UNITED STATES RULES, pg. 404-42). If Judges and prosecutors can justify the admissibility of prior unlawful acts by merely restating the language of Rule 404(b) in its entirety, the extreme caution and disfavor with which such evidence has always been regarded will be a thing of the past, and the admissibility of such evidence will become the rule, rather than the exception. Exactly such a fear was recognized in *U.S. v. Cook*, 538 F.2d 1000, (3rd Cir. 1976).

Furthermore, there are no criteria set forth under Rule 404 to help guide a Trial Judge in implementing the provision of the rule. Some guidelines need to be set forth to establish the degree of similarity (and allowable remoteness) between the offending act and the prior bad act to render the evidence admissible under Rule 404. The confusion and conflict which exists among the circuits in the application of Rule 404 may be demonstrated by the following excerpts from various cases decided after the implementation of the Federal Rules of Evidence:

[1] *U. S. v. Scholle*, 553 F.2d 1109 (8th Cir. 1977)

The defendant was on trial for the importation of *cocaine*. A witness for the prosecution was

allowed to testify, under Rule 404, as to a particular transaction occurring *two years* earlier when the defendant had loaned money to the witness to buy some *marijuana*. The Trial Judge apparently felt that two years was not too remote and that the two acts by the defendant were similar enough to invoke Rule 404 to justify its admission. The conviction was affirmed by the 8th Circuit.

[2] *U. S. v. James*, 555 F.2d 992 (D.C.C.A. 1977)

In *James*, the two related acts of the defendant were but sixteen days apart and both were drug offenses involving heroine. Although a high degree of similarity was found by the Court of Appeals, that evidence concerning the prior bad act was held inadmissible on appeal because it failed to prove any issue in the trial. The Court clearly indicated that it would weigh the probative value of the evidence against its inherent prejudice.

[3] *U. S. v. Bloom*, 538 F.2d 704 (5th Cir. 1976)

The defendant in *Bloom*, was tried for the possession of heroine. Extrinsic evidence of the defendant's prior dealings with cocaine and marijuana was held admissible as *similar* offenses. The Court stated that the defendant's willingness to deal in a variety of controlled substances had a direct bearing on his mens rea with respect to possessing heroine.

[4] *U. S. v. Park*, 525 F.2d 1279 (5th Cir. 1976)

In *Park*, the defendant was charged with knowingly receiving a stolen *T.V. set*. The Court of Appeals held that it was error for the Trial Court

to allow cross-examination of a defense witness insinuating improper conduct of the defendant concerning *air conditioners*. Citing Rule 404(b), the exception does not apply unless there is "such a exception does not apply unless there is "such a high degree of similarity (between crimes) as to mark it as the handiwork of the accused."

[5] *U. S. v. Marshall*, 526 F.2d 1349 (9th Cir. 1976)

In the prosecution for possession and distribution of *heroine*, evidence of the defendant's prior possession of *cocaine* was held admissible under Rule 404, to establish knowledge, intent, and motive on the defendant's behalf.

[6] *U. S. v. Goodwin*, 492 F.2d 1141 (5th Cir. 1974)

The defendant was on trial for conspiracy to import and importing *marijuana*. The Court of Appeals held inadmissible, evidence of apprehension of the defendant while bringing *marijuana* into the United States only *nine months* after the crime with which he was charged. The same drug, marijuana was involved in that case; the same mode of operation, importation was the same; and the time span between the two offenses was only nine months. Yet, the evidence was held inadmissible.

[7] *U. S. v. Ziedman*, 540 F.2d 314 (7th Cir. 1976)

The 7th Circuit held that a *five year* time span between related offenses establishing a course of conduct was not too remote to prevent admissibility under Rule 404.

[8] *U. S. v. Myers*, 550 F.2d 1036 (5th Cir. 1977)

In *Myers*, the government attempted to introduce evidence of a previous Pennsylvania Bank robbery to prove that the defendant had committed a Florida Bank robbery because it exhibited characteristic "modus operandi". The government offered ten separate indicia of similarity between the two bank robberies arguing that these ten common features gave the evidence of the other crime sufficient probative value to outweigh the prejudice to the defendant. (at page 1046). The Court of Appeals held these common features insufficient under Rule 440 to justify their admission. The Court in its opinion (at 1045) stated that the two crimes "must possess a common feature or features that make it very likely that the unknown perpetrator of the charged crime and the known perpetrator of the uncharged crime are the same person. The more unique each of the common features is, the smaller the number that is required for the probative value of the evidence to become significant."

Not only was Rule 404(b) improperly applied below; there is no evidence that the judicial function contemplated by Rule 403 was ever performed. Assuming that the Trial Court had considered Rule 404(b) applicable, and had determined that Nolan's prior unlawful conduct in Great Britain fell within one of these specific exceptions listed in Rule 404(b), Rule 403 then contemplates a balancing between whatever probative value the prior conduct might have, and the obvious prejudicial impact it would have on

the jury. Rule 404 provides only that evidence *may* be admissible. The Advisory Committees' Notes on Rule 404 state that:

> "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403(a)."

The Trial Judge never even considered Rule 403, and, consequently, no balancing of these two conflicting factors ever took place at trial. Although such balancing is in the Trial Court's discretion, such discretion *must* coincide with consideration of Rule 403. Rule 403 recognizes that relevancy is not always enough. The question remains as to whether the value of the evidence is worth what it costs in light of the prejudice to the defendant. The Trial Court *must* assess the probative value of the preferred evidence as well as the harmful consequences specified in Rule 403 that might arise from its admission. It is without question that evidence which appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action may cause a jury to base its decision on prejudice rather than those propositions established by relevant evidence in the caes in chief. (See 1 Weinstein's Evidence, UNITED STATES RULES, pg. 403-16).

To prevent such "trials by prejudice", the applicability of Rule 403 must be considered by the Trial Court. The Trial Court's discretion in these matters is subject to reversal where this discretion has been abused. The petitioner contends that this discretion has been abused, where, as in the case at bar, the Trial Court abdicated his judicial responsibility by refusing to consider Rule 403.

The petitioner submits, therefore, that certiorari should be granted in this case for the specific purpose of establishing criteria to be employed in all federal courts where the prosecution seeks to admit evidence of an accused's prior unlawful conduct under Rule 404; where the accused has not placed his character in issue by taking the witness stand.

The petitioner proposes the following criteria:

1. Selection of a Specific Exception.

   Rather than merely reciting Rule 404(b) verbatim, the prosecution should be required to specify which stated exception under Rule 404(b) is to be established by the evidence of the prior unlawful act.

2. Probative Value.

   After the applicable exception has been specified, the prosecution should then be required to show just *how* the evidence of the accused's previous conduct establishes the particular specified exception. If the unlawful evidence merely shows the

accused to be a person disposed to commit the type of offense for which he has been charged, because he did something similar in the past, the evidence should be rejected.

3. Balancing Prejudice and Probative Value.

If, under a proper application of the two foregoing criteria, it is determined that the evidence in question is admissible, under Rule 404, it should still not be admitted unless the probative value of the evidence is weighed against the prejudicial impact of the same. If the evidence is ultimately admitted, as noted in *Burkhart*, supra, the accused will undoubtedly be convicted. Accordingly, the prior unlawful conduct must be so intimately tied to the offense charged that the two are virtually inseparable, and proof of the former literally establishes the latter.

Petitioner, Nolan, respectfully submits that, if the foregoing criteria were adopted by this Honorable Court, the shot-gun admissibility of prior unlawful conduct such as occurred below, would be effectively precluded, and a more careful analysis of the proferred evidence would be required. When prior bad act evidence reaches the attention of the jury, it is most difficult, if not impossible, to assume the continued integrity of the presumption of innocence. Guilt or innocence as to a particular crime should be determined solely on the basis of evidence relevant to *that* crime. The

various federal courts need to be reminded of the historic disapproval of such character evidence in the common law. Such disapproval was well-founded. Rule 404 must not be allowed to be used to introduce highly prejudicial evidence by merely quoting the language of the Rule verbatim as was done in the case at bar. The Trial Court must balance what is *proven* by such evidence against what might be improperly *inferred* from such evidence. A defendant in the Anglo-American system of justice must not be found guilty by a jury on the basis of improper inferences drawn from improperly admitted evidence. As shown above, this is exactly what is occurring under the new standards being set forth by the various circuits under Rule 404.

The petitioner also seeks certiorari for a different, but related reason. Nolan's jury was not merely given a brief exposure to his prior record; rather, the jurors were given ten times the lethal dosage. First, the jury learned of Nolan's record through the testimony of the custom's agent, who related that the computer check he ran on Nolan revealed his English conviction. The ostensible justification for this testimony was to show *why* the search of the packing crate which lead to the discovery of the contraband was made. It was argued unsuccessfully to the Trial Judge, and to the Tenth Circuit, that *why a* search was made is not a proper subject for the jury's consideration, particularly in light of

the prejudicial effect such evidence has on the defendant. By analogy, this evidence is no more proper for the jury to receive than an affidavit for a seach warrant would be. Once the contraband is discovered, *why* the search was initially made is immaterial and inadmissible.

Next, this evidence was underscored for the jury by the testimony of the British custom's agent who initially apprehended Nolan. The agent, however, did not merely recite that Nolan was apprehended attempting to interdict contraband into England, but the agent, over the defendant's objection, was permitted to testify as to his in-custodial interrogation of Nolan, the admissions procured thereby, the charges ultimately brought against Nolan, the judicial proceedings which followed, the content of the pre-sentence investigation, and even the remarks of the British Judge at the time of sentencing!

Finally, the *coup de grace* was administered to Nolan by the admission, over Nolan's objection, of testimony as to the "street value" of the marijuana, assuming that it had been broken down into ounces and then sold on the street for $20.00 an ounce. That Nolan had such an intention is purely speculative, for the record reveals no evidence to support any charge that Nolan intended to distribute the marijuana. Finally, on closing argument, the prosecutor

stated that Nolan would receive $2,400.00 in profit when he sold it on the street, which the government stated was

". . . not too bad for a day's work."

It was in this fashion that a whole new type of unlawful conduct other than charged in the indictment was introduced to the jury. Nolan was charged with the unlawful importation of marijuana; then he was portrayed to the jury as being just another "dope pusher." The prejudice conjured up in the jury's minds by the stereotype image of a drug dealer is impossible to portray in mere words, for it is the most depised stereotype image in contemporary American society. The mere mention of a "dope pusher" immediately produces images of a sallow-faced Mafioso lurking around playgrounds attempting to get five year old children hooked on heroin. A juror who was then lead to believe that a defendant is one of these "dope pushers" would be somewhat reluctant to return a verdict of "innocent".[1] The petitioner draws little comfort from the Tenth Circuit's acknowledgment that the closing argument was improper, for it was held to be "harmless error."

---

[1]The jury was instructed by the Trial Court that it could find the defendant "guilty" or "innocent," rather than the usual standards of "guilty" or "not guilty." Although the petitioner may not have been proven guilty beyond a reasonable doubt in this case, even he acknowledges that it would be difficult for a jury to find him "innocent." This instruction was approved by the Tenth Circuit in its opinion below.

To summarize, the petitioner submits that certiorari should be granted in this case to establish criteria for the implementation of Rules 403 and 404(b), which would preclude a haphazard invocation of these Rules to admit evidence of prior unlawful conduct and the effortless fashion with which it was admitted below. Further, the petitioner seeks certiorari to review the propriety, while on trial for the importation of marijuana, of his being subjected to the above mentioned "dope pusher" stereotype resulting from the prosecutor's closing argument.

COPIES OF THE OPINION BELOW, AND THE ORDER DENYING THE PETITION FOR RE-HEARING ARE SUBMITTED UNDER SEPARATE COVER

WHEREFORE, Charles Wallace Nolan, Jr. respectfully petitions this Honorable Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit rendered below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, C. Rabon Martin, certify that on the 2nd day of September, 1977, I mailed a true and correct copy of the above and foregoing Petition for a Writ of Certiorari to the Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, with sufficient postage prepaid thereon to entitle same to due passage in the United States mail.

C. Rabon Martin

Supreme Court, U. S.
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APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 76-1177

UNITED STATES OF AMERICA, Appellee, vs. CHARLES WALLACE NOLAN, JR., Appellant.	)	Appeal from the United States District Court for the District of Kansas (D.C. No. 75-164-CR6)

Submitted: January 25, 1977

Jon K. Sargent, Assistant United States Attorney, (E. Edward Johnson, United States Attorney, on the brief), District of Kansas, Wichita, Kansas, for Appellee.

C. Rabon Martin of Baker, Baker and Martin, Tulsa, Oklahoma, for Appellant.

Before, LEWIS, Chief Judge, and PICKETT and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

Charles Wallace Nolan (Nolan) appeals from a jury conviction on charges stemming from an indictment alleging that he imported controlled substances into the United States in violation of 21 U.S.C.A. §952(a).

On July 3, 1975, an air waybill was executed in New Delhi, India, by Paul Edward Donegan, pertaining to a crate consigned to Nolan in Emporia, Kansas. Nolan had been in India approximately one month before the crate was shipped. While in India, Nolan had purchased certain musical instruments contained in the crate.

When the crate arrived in the United States, the Customs Director sent a notice to Nolan at Emporia directing him to pick up the package at the airport in Wichita, Kansas. The Customs Director then ran a computer check with the Department of the Treasury for information regarding Nolan. The computer provided information that Nolan had been convicted of a drug importation violation in the Commonwealth of Great Britain in 1973. This prompted the Customs Agent to conduct a careful examination of the crate. By drilling holes in the crate, he determined that it was hollow and that it contained a controlled substance, i.e., marijuana.

After Nolan arrived at the Wichita airport to receive the package, he pointed to the crate with the sitar and drums at its side and remarked "I see you have got my stuff." He said that he had gone to India for about six weeks to learn to play the sitar. Nolan was then arrested, whereupon he said that he had "never been to India" and that he knew nothing of the controlled substance in the crate.

Nolan moved for a suppression of the controlled substance. The motion was denied following a full hearing.

At trial, the government offered the testimony of the Customs Director regarding Nolan's British conviction originally revealed by the Treasury Department computer, to show a justifiable basis for the search. The government also presented the testimony of the British Customs Agent who had apprehended Nolan for importing various contraband materials into the Commonwealth in 1973, ostensibly for the purpose of showing knowledge, intent, motive, common plan and scheme. The British Agent testified about custodial admissions of Nolan, the court proceedings, the pre-sentence investigation and the judicial disposition. The government showed the "street value" of the marijuana and argued to the jury that Nolan hoped to reap great profits from it. Nolan did not present any evidence. The trial court instructed, inter alia, that one of the jury's functions was to find the defendant guilty or innocent (as compared to the normal standard of not guilty).

Nolan was sentenced to three years imprisonment, followed by a two year probationary term.

On appeal Nolan argues that the court erred (1) in admitting testimony dealing with the prior British conviction; (2) in admitting evidence and argument regarding Nolan's forthcoming distribution of the contraband; (3) in upholding the verdict inasmuch as the evidence was not sufficient to support a conviction; and (4) in instructing the jury.

I.

Nolan contends that the court erred in admitting testimony regarding Nolan's prior British conviction for the importation of hashish.

In 1973, when Nolan was en route from New Delhi, India, to the United States he landed at a London airport. During that stop, a British Customs Agent discovered contraband on Nolan's person and in the base of some wooden lamps he was carrying. The British Customs Agent was allowed to testify about a confession Nolan made to him in Britain and that Nolan was charged with and pled guilty to violation of the British importation laws. We hold that this testimony is admissible.

A.

Nolan contends that an alien criminal conviction is inadmissible, per se, in a United States federal criminal proceeding; and, in the alternative, that before admitting such a criminal conviction, it must be shown that each and every United States constitutional safeguard afforded criminal defendants was complied with in the foreign country where the conviction was obtained.

The government asserts that this issue was not raised at trial and therefore the appellate court should not consider it. In reviewing the record we find, however, that the issue was raised at trial and thus preserved for our consideration. [R., Vol. III, p. 115.]

Nolan admits that he does not have any authority directly in point. He relies on Burgett v. Texas, 389 U.S. 109 (1967). His reliance on Burgett, supra, is misplaced. The Court there held that a conviction violative of the constitutional right to counsel cannot be introduced "to support guilt or enhance punishment." 389 U.S., at 115. The British conviction was not introduced "to support guilt or enhance punishment." It was introduced solely for the purpose of showing intent, design, a continuing course of

conduct, guilty knowledge, mental disposition, capacity, habit, plan, motive or identity. Therefore, Burgett, supra, is inapplicable.

We have repeatedly held that evidence of uncharged crimes, wrongs or alleged prejudicial acts may be received for purposes proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. United States v. Freeman, 514 F.2d 1184 (10th Cir. 1975); United States v. Parker, 469 F.2d 884 (10th Cir. 1972); United States v. Pickens, 465 F.2d 884 (10th Cir. 1972); United States v. Pauldino, 443 F.2d 1108 (10th Cir. 1971), cert. denied, 404 U.S. 882 (1971); United States v. Eagleston, 417 F.2d 11 (10th Cir. 1969). The evidence in question in each of the above cited cases was not that of a criminal conviction, but it was that of criminal activity. It follows, then, that the evidence introduced under this exception need not be a constitutionally valid criminal conviction. Even if Nolan's British conviction should not meet our federal constitutional demands, it is still admissible under this exception. Furthermore, Fed. Rules of Evid. Rule 404(b), 28 U.S.C.A. supports this conclusion by reference to admission of evidence of "Other crimes, wrongs or acts." That rule does not require proof of a conviction such as that required under Rule 609 of the Federal Rules of Evidence.

We need not decide if a British conviction is admissible to prove guilt or enhance punishment. That issue is not before us.

We hold that an alien conviction is admissible for the purpose of proving a common plan, motive, opportunity, intent, knowledge, identity or absence of mistake if relevant and material

to the charges and issues raised in the federal prosecution. The proof of Nolan's British conviction was used for these purposes in the instant case.

B.

In a related issue, Nolan contends that evidence of his prior British conviction was inadmissible under Fed. Rules of Evid. Rules 404 (b) and 403, 28 U.S.C.A.

A British Customs Agent was allowed to testify as to the importation of contraband into England by Nolan two years before the instant incident. The agent stated: that the contraband was shipped from New Delhi, India, in the base of wood lamps; that Nolan told the British agent that he paid a man in New Delhi to put the contraband in the wooden lamps, and that he intended to smoke part of it; that Nolan pled guilty to the British charge; that Nolan was fined $250.00 and that a prison sentence was defaulted because Nolan left the country. The trial court instructed the jury that this evidence was not admissible for proof of the crime charged, nor for proof that Nolan acted in conformity with his bad character, and further that the evidence should not be considered as constituting a separate or additional crime. The jury was specially instructed that this evidence was admissible exclusively for purposes going to proof of motive, opportunity, intent, preparation, plan, knowledge, identity, and for absence of mistake or accident. The jurors were instructed to consider same entirely within these confines.

The general rule is that evidence of illegal activities other than those charged is ordinarily inadmissible. There are, however, several well-recognized exceptions to the rule, including

receipt of such evidence in order to prove motive, opportunity, identity, absence of mistake or accident. United States v. Freeman, supra; United States v. Burkhart, 458 F.2d 201 (10th Cir. 1972); United States v. Pauldino, supra.

We note that Rule 404(b), supra, is not exclusionary in the sense of the above rule of our Court. Rather, it would allow the admission of uncharged illegal acts unless the only purpose for their admission is to prove the criminal disposition of the defendant. We hold that under either rule, however, the evidence of Nolan's prior conviction is admissible.

The probative value of proof of the commission of the prior crime must outweigh the prejudice. Rule 403, supra. This determination is properly within the trial judge's discretion. United States v. Drumright, 534 F.2d 1383 (10th Cir. 1976), U.S. Appeal Pending; United States v. Baca, 444 F.2d 1292 (10th Cir. 1971), cert. denied, 404 U.S. 979 (1971). A critical issue in the case at hand was Nolan's intent and knowledge. Proof of the British conviction was very relevant in the proof of those elements of the crime. In view of its obvious probative value, we hold that the trial court did not abuse its discretion in admitting this evidence.

In United States v. Parker, supra, we announced some guidelines to test whether evidence of uncharged illegal acts should be admitted: (1) the evidence must tend to establish intent, knowledge, motive, identity, or absence of mistake or accident; (2) the evidence must be so related to the importation of contraband that it serves to establish intent, knowledge, motive, identity, or absence of mistake or accident; (3) the evidence

must have real probative value, not just possible worth; and (4) the uncharged illegal act must be close in time to the crime charged. See also: United States v. Burkhart, supra.

Evidence that Nolan had imported hashish into England certainly supports the elements of knowledge, intent, and motive.

The instant case is quite similar to United States v. Marshall, 526 F.2d 1349 (9th Cir. 1975). cert. denied, ___ U.S. ___. There, evidence of cocaine possession was introduced in a heroin distribution trial to show knowledge, intent and motive. The court held:

> . . . Both heroin and cocaine are 'narcotic drugs' under 21 U.S.C. §802(16); if the jury could find Marshall knew the character and uses for the cocaine, they might reasonably infer that he knew the character and uses of heroin.
>
> 526 F.2d, at 1360-1361.

Various circuit courts have admitted into evidence proof of other illegal controlled substance activities in a trial dealing with illegal controlled substance charges, as establishing various elements of the crime. United States v. Wixom, 529 F.2d 217 (8th Cir. 1976); United States v. Brettholz, 485 F.2d 483 (2d Cir. 1973), cert. denied, 415 U.S. 976 (1974); United States v. Alston, 460 F.2d 48 (5th Cir. 1972), cert. denied, 409 U.S. 871 (1972). We repeat that the evidence of the British conviction was certainly probative of Nolan's intent, knowledge, motive, and absence of mistake or accident.

The factual situation in the instant case and in the British case are so similar that a strong relationship is established. In both cases the controlled substance was imported from New Delhi, India, concealed in wood. The fact of concealment in wood is significant because Nolan confessed to the British Customs Agent that his contact in India was in the business of concealing contraband in wood for exportation. Further, the two transactions are similar in relation to the controlled substance. The British conviction involved hashish, a derivative of Cannabis, and the instant case involved marijuana, also a derivative of Cannabis. The two incidents occurred only two years apart. They were near in time.

We hold that the trial court met all of the guidelines of Parker, supra. There was no abuse of discretion in the admission of evidence of Nolan's prior British conviction. Furthermore, the requirements of Rule 404(b), supra, were met.

C.

Nolan contends that the trial court committed prejudicial error in allowing testimony of his prior record to show justification for the search of the packing crate.

U.S. Customs Director William O'Donnell testifed that when the shipping crate arrived at the Wichita International Airport, he ran a computer check of Nolan's name with the Department of the Treasury. This yielded information of the British conviction. Armed with this information, he undertook an examination of the crate and discovered the contraband.

Nolan offered to confess the validity of the search if his prior conviction could be withheld from the jury. He offered to

stipulate that he would admit that there was probable cause for the search if "the whole English affair was kept completely out of the record." [R., Vol. III, p. 133.] This, of course, would have precluded any evidence of the British crime from being introduced. We have heretofore held that the testimony of the British customs agent as to the British crime was properly introduced under Rule 404(b), supra. Accordingly, we hold that Nolan's offer to stipulate was properly rejected.

As Nolan asserts, O'Donnell's testimony relative to the computer-check information was not properly admitted, inasmuch as it went only to the validity of the search, involving a question of law for the court and no issue of relevance for jury determination. Delli Paoli v. United States, 352 U.S. 232 (1957); Sparf and Hansen v. United States, 156 U.S. 51 (1895). Even so, we hold that it is harmless error in light of the admissibility of the testimony elicited from the British Customs Agent. Nolan's stipulation would have prevented the admission of any part of "the whole English affair" which clearly was self-serving. We hold that O'Donnell's testimony did not create prejudicial error and that it did not contribute to the conviction. Schneble v. Florida, 405 U.S. 427 (1972); Chapman v. California, 386 U.S. 18 (1967).

D.

Nolan contends that the trial court erred in permitting the British Customs Agent to establish Nolan's British conviction by oral testimony alone, without presentation of duly certified and authenticated copies of the foreign judgment.

The trial judge offered to have the supporting documents of

the British conviction marked when Nolan's counsel objected. Nolan's counsel stated that he did not want them marked. This occurred at the very time the British Customs Agent was testifying. [R., Vol. III, p. 254.] Under these circumstances, Nolan is bound by his own conduct of waiver. His objection here is untimely. He rejected the trial court's offer to cause the subject documents to be marked for identification and made no subsequent objection as to their admissibility. Further, the British Agent testified that he had charged Nolan personally with the British crime and that he (the agent) was present throughout the British court proceedings against Nolan. Obviously, the agent had first hand, independent knowledge of the facts he testified to.

We hold that the British Agent's testimony was admissible. There was no abuse of discretion in its admission. Absent an abuse of discretion by the trial court, an appellate court is bound to uphold its ruling as to the materiality and relevancy of proffered evidence. Young v. Anderson, 513 F.2d 969 (10th Cir. 1975); United States v. Twilligear, 460 F.2d 79 (10th Cir. 1972); United States v. Brown, 411 F.2d 1134 (10th Cir. 1969).

E.

Nolan contends that his in-custodial confession to the British Customs Agent in 1973 should not have been admitted because it was not shown that Nolan was given the necessary warnings dictated by Miranda v. Arizona, 384 U.S. 436 (1966).

Concededly, Nolan was not given the specific Miranda warnings. He was told, however, that "he was not obliged to say anything unless he wished to do so but anything he did say may be put into writing and may be given in evidence." [R., Vol. III, p. 246.]

In any event, this contention is without merit. The Miranda warnings are "not essential to the validity of a confession which has been given in a foreign country." United States v. Mundt, 508 F.2d 904, 906 (10th Cir. 1974), cert. denied, 421 U.S. 949 (1975); United States v. Chavarria, 443 F.2d 904 (9th Cir. 1971). The reasoning in United States v. Chavarria, supra, is applicable:

> . . . Miranda was intended as a deterrent to unlawful police interrogations. When the interrogation is by the authorities of a foreign jurisdiction, the exclusionary rule has little or no effect upon the conduct of foreign police. Therefore, so long as the trustworthiness of the confession satisfies legal standards, the fact that the defendant was not given Miranda warnings before questioning by foreign police will not, by itself, render his confession inadmissible.
> . . .
>
> 443 F.2d, at 905.

II.

Nolan argues that the trial court erred in allowing Agent Miller to testify as to the street value of the contraband seized and that a mistrial should have been granted when the prosecutor stated in his closing argument that:

> The defendant knew exactly what he was doing and he hoped to profit by it, to-wit, under the testimony of Special Agent Jim Miller, who testified as to the value, the street value of the marijuana, approximately $20 an ounce. There were approximately 120 ounces, $2,400, which is not too bad for a day's work.
>
> * * *
>
> The defendant got caught with his 'hand in the cookie jar' and now he has to take his medicine. It is that simple.
>
> [R., Vol. III, pp. 302-304.]

Nolan contends that this statement persuaded the jury that he was going to sell the marijuana which he had imported, thus constituting a crime with which he had not been charged.

We hold that the testimony as to the value of the marijuana does not constitute grounds for a mistrial. The trial court properly admitted evidence of the value of the marijuana in order to show a motive for importing it. In that light the testimony relative to the "street value" is both relevant and material. It is common knowledge that contraband is imported into the United States for great profit. The relevancy and materiality of evidence are matters within the sound discretion of the trial court. That judgment will not be disturbed unless there is a clear showing of abuse of discretion. Young v. Anderson, supra; United States v. Twilligear, supra; United States v. Brown, supra.

The prosecutor's closing argument could be interpreted in two ways: it could imply that Nolan was going to make a profit by selling the marijuana; or, it could imply that Nolan was going to use the marijuana himself and thus save the money it would require if he "bought" it on the "street." When a controlled substance is imported there would seem to be only two reasons for its importation: either for personal use or for resale. The prosecutor's remarks related to these inferences. While either inference may suggest a crime for which Nolan was not charged, and therefore should not have been broached by the Government, still no serious prejudicial error occurred. We do not attribute a lack of intelligence or common sense to jurors in arriving at judgments. The prosecutor is entitled to reasonable latitude in drawing inferences from the record in his closing argument. While we agree that the prosecutor should not have made the challenged

remarks, we cannot say that they constituted plain error affecting Nolan's substantial rights in light of the entire record. Fed.R. Crim.P. rule 52(a), 18 U.S.C.A.; United States v. Gilbert, 447 F.2d 883 (10th Cir. 1971).

III.

Nolan contends that the evidence is insufficient as a matter of law to support his conviction in that it does not demonstrate that he either shipped or caused the contraband to be shipped.

The appellate court does not weigh conflicting evidence or pass on the credibility of witnesses. United States v. Downen, 496 F.2d 314 (10th Cir. 1974), cert. denied, 419 U.S. 897 (1974). The evidence, and all reasonable inferences, must be viewed in the light most favorable to the government. United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975).

The evidence viewed in the light most favorable to the government is that:

1. Nolan had been in India just prior to the shipment of the contraband.

2. Nolan had made arrangements to receive the crate prior to its arrival.

3. Nolan stated that the sitar was his, and that he had been in India to learn to play the sitar contained in the crate; however, following his arrest, he recanted, stating that he had never been to India.

4. Nolan knew of an agent in India who would pack contraband in wood for him. Nolan had previously illegally imported a similar controlled substance into Great Britain.

Thus it was shown that Nolan knew of the shipment of the crate before it arrived; that he could arrange for a shipment of this type; and that he knew that importation of marijuana was illegal.

IV.

Nolan contends that the trial court erred in: (a) instructing on circumstantial evidence; (b) instructing on the function of the jury; (c) by refusing to instruct the jurors that they could not presume that because Nolan received the crate that he had shipped it; and (d) by refusing to instruct that the jury should be reluctant to find guilt because of the greater propensity to convict in a narcotics case. We find these issues to be individually and collectively without merit.

(a)

Nolan contends that the trial court erred by instructing the jury that before circumstantial evidence can establish a fact it must be the only reasonable conclusion but it need not exclude every other possible hypothesis. Nolan asserts that the trial court should have instructed that every reasonable hypothesis of innocence must be excluded.

Nolan "admits that the court's instruction is not inherently prejudicial, . . ." [Appellant's Brief, p. 46.] The form of instructions is committed to the discretion of the trial court and there is no requirement that the court use the exact language as that requested, provided the issues of the case are adequately covered. United States v. Newson, 531 F.2d 979 (10th Cir. 1976). We hold that the instruction on circumstantial evidence is not erroneous.

(b)

Nolan contends that the trial court erred in instructing the jury that its function was to find Nolan guilty or innocent. The trial court did instruct that:

> . . . The only matter before you is the question of whether or not the defendant is guilty or innocent of the crime charged in the indictment. [Emphasis supplied.]
>
> [R., Vol. III, p. 324.]

The trial court also instructed the jury that there is a presumption of innocence; that a verdict of guilty cannot be returned unless the prosecution has proved that the accused is guilty beyond a reasonable doubt of every essential element of the crime charged [R., Vol. III, p.309.]; that if two conclusions can be reasonably drawn from the evidence, "one of innocence and one of guilty, you should adopt the former" [R. Vol. III, p. 311.]; and that it is incumbent ". . . upon the United States to establish by the evidence to your satisfaction beyond a reasonable doubt, . . . every material allegation of the offense." [R., Vol. III, p. 319.]

We hold that the totality of the instructions correctly apprised the jury of its function. United States v. Pennett, 496 F.2d 293 (10th Cir. 1974).

(c)

Nolan contends that the jury should have been instructed that there is no presumption that a person who receives a package knows that the package contains contraband. Nolan does not cite any authority for this proposition. We hold that the instructions

taken as a whole properly stated the law as to Nolan's requisite knowledge.

(d)

Nolan would also have had the jury instructed that the average juror has a greater propensity to return a guilty verdict in a prosecution involving drugs and that the jurors should be careful to avoid this propensity. He can cite no authority beyond his bald contention that the proposition is "common knowledge among the criminal defense law." There is no basis for the adoption of such an instruction. The jurors were instructed to avoid any prejudice they may have for the government.

WE AFFIRM.

MAY TERM - July 7, 1977

Before The Honorable David T. Lewis, Chief Judge,
The Honorable John C. Pickett, Senior Judge,
The Honorable Oliver Seth, Circuit Judge,
The Honorable William J. Holloway, Jr., Circuit Judge,
The Honorable Robert H. McWilliams, Circuit Judge,
The Honorable James E. Barrett, Circuit Judge,
The Honorable William E. Doyle, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	No. 76-1177
CHARLES WALLACE NOLAN, JR., Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Lewis and Circuit Judges Pickett and Barrett to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

A true copy

Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By Linda A. Thill
Deputy Clerk

Howard K. Phillips
HOWARD K. PHILLIPS
Clerk